Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision

verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/

Kim Lane Scheppele Sa 28 Jul 2018 Sa 28 Jul 2018

Suppose you had a craving for a mango. Most people would simply go to the local market to buy one. Mangoes might not always be in season or your local market might run out of them before you got there or the quality might be questionable on any particular day, but those are the vagaries of retail shopping. You might not always get a mango when you want one.

Suppose you knew, however, that you would *always* crave mangoes – every day of the year – and moreover that you would always want to share the delight of mangoes with your friends, because you believe that mangoes are absolutely essential to the quality of life. If mangoes are that important and you need a regular supply of them, then you should arrange for stable, bulk delivery with a reliable supplier under a legal contract. You shouldn't depend on the fluctuations in the local market for something that important; you'd depend on the law by ordering mangoes wholesale. You'd create a structural solution to the mango problem.

A craving for the rule of law can also be satisfied in two ways. You can invoke it legally through a case-by-case checking of its presence in any particular instance (though of course, retail assessment means you're at the mercy of the court near you) or you can better guarantee a steady and plentiful delivery by contracting wholesale, thus providing a legal constraint on the supplier's ability to deviate. This week's decision of the European Court of Justice in the "*Celmer*" case (Case C-216/18 PPU, *Minister for Justice and Equality v LM*) tells us that the rule of law is now available retail in the European Union, but it is not now – and probably can never be – available wholesale. *Celmer* is an advance over prior the state of affairs because you may now be able to find rule of law in your local courts, but this doesn't provide structural assurances that the rule of law will always be available. On providing wholesale guarantees for the rule of law, the *Celmer* judgment is alarming.

The reference from the Irish High Court involved several Polish nationals present in Ireland who were sought for prosecution in Poland through the automatic operation of the European Arrest Warrant (EAW). The narrow question posed in *Celmer* (so-called because the referring court named the person at the heart of the case) was whether the national judge, upon receipt of an EAW for a person in her bailiwick, was obligated to turn the person over to the issuing authority if the issuing country had compromised the independence of the country's judiciary. The observant judge from the Irish High Court,

Justice Aileen Donnelly, was shocked reading the European Commission's Reasoned Proposal to the Council in December 2017, calling for Article 7(1) TEU to be invoked with regard to Poland because the judiciary in Poland had been systematically attacked and was no longer reliably independent:

> 123. The Reasoned Proposal of the European Commission is, by any measure, a shocking indictment of the status of the rule of law in a European country in the second decade of the 21st Century. It sets out in stark terms what appears to be the deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law. Even "the constitutionality of Polish laws can no longer be effectively guaranteed" because the independence and legitimacy of the Constitutional Tribunal are seriously undermined . . . .

Justice Donnelly asked the ECJ whether, under the circumstances, she still had to follow the governing doctrine for making an exception to automatic extradition guaranteed by the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States. According to *Aranyosi and Calderaru* (C-404/15 and C-659-15, Grand Chamber, 5 April 2016), a national judge should perform a two-step test before making an exception. First, the executing judge should assess whether there is a relevant structural deficiency in the issuing state. In both Hungary and Romania, from which those cases came, European Court of Human Rights judgments had found prison conditions to violate the rights of prisoners under the European Convention of Human Rights. Structural deficiency – check! But, under *Aranyosi,* the executing judge also had to take a second step to determine whether that structural deficiency would affect the rights of the *particular individual* sent back to the deficient state. The national judge could only *suspend* operation of the EAW in a particular case if the concrete individual's rights would be violated by sending him or her to the issuing country. The ECJ insisted that there could be not a general suspension of the EAW with regard to a rights-deficient state. Temporary suspension in the individual case was the only choice available to an executing judge faced with fundamental deficiencies in the issuing state. The EAW was to take priority over (almost) every other consideration, and any exceptions were to be narrowly construed.

In *Celmer*, the ECJ confirmed that *Aranyosi's* two-step test is still the reigning standard. The executing judge, having identified a deficiency in rights protection in the issuing state, must still assess whether the particular individual would run the risk of having her rights violated if sent to that state. But the ECJ nonetheless radically expanded the grounds on which the executing judge could refuse to honor an EAW. Following its judgment in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (C-64/16, 27 February 2018) (the Portuguese judges case) which required that all Member States maintain independent judiciaries under Article 19(1) TEU, the ECJ said in *Celmer* that an executing judge should take into account whether the issuing state had an independent judiciary. Even more explicitly than in the Portuguese judges case, the ECJ in *Celmer* linked Article 47 CFR's individual right to a fair trial to the structural provision of Article 19(1) TEU requiring an independent judiciary as the guarantor of effective remedies, and then tied both to the principle of the rule of law under Article 2 TEU. This is a big deal.

Until very recently, it seemed unimaginable that the ECJ would find that the principles of Article 2 TEU could be protected by legal means, despite a growing chorus of commentators who had urged the Court to do so. The Portuguese judges case was stunning in its novelty and boldness, and it gave many of us hope that the ECJ would eventually require the Polish and Hungarian authorities to honor the values of Article 2 TEU. *Celmer* gave the ECJ its first chance to demonstrate what would follow once the lack of judicial independence in a Member State had been comprehensively assessed by a European institution and found wanting.

Because the case arose as an individual EAW determination, however, the ECJ in *Celmer* was called upon to address the retail availability of the rule of law in specific cases. The Court instructed executing judges to consider judicial independence as one factor among many in deciding whether individuals' rights would be violated if they were sent to compromised issuing states. The Court also found that the Reasoned Proposal of the Commission was "particularly relevant" (para. 61) for the purposes of this assessment. Justice Donnelly will now no doubt refuse to send the targeted people before her back to Poland, given what she has concluded about the Commission's Reasoned Proposal. All over the EU, we can now expect judges to read the Commission's assessment as a statement of fact and temporarily suspend EAWs from Poland. This is a revolution in the rule of law – and it is all to the good. But the judgments will occur retail. And just like the local market that may or may not have mangoes on any given day, issuing judges across the EU may or may not find that the rule of law is available in Poland. They are not required to refuse all EAWs from Poland.

Case-by-case or "retail" rule of law assessments cannot by themselves guarantee the rule of law more generally without being backed by a wholesale approach that ensures as a matter of law that the structural preconditions necessary for the rule of law to exist are in fact present. Consider two problems that arise under the EAW Framework: the problem of rights-violating detention conditions and the problem of a politically compromised judiciary. For detention, the *Aranyosi* "retail" approach works well enough. The executing court could require that the individual sent to the issuing country be held in a facility that did not violate his rights, if such a facility were available. The executing judge could ask the issuing judge to search the country and certify that the particular place of detention for the person in question met the standards of the ECHR (and the EU's Charter of Fundamental Rights as well). Problem solved.

But when the *whole judiciary* is the problematic institution, then a case-by-case assessment doesn't work. If the courts are compromised so that one cannot reliably tell which judges are independent and which are operating under political tutelage, then arbitrariness can sneak in anywhere in the system, including at the point at which the judge must reliably promise that a sought person would have his rights respected upon delivery to the compromised state. For example, a garden-variety criminal case might not look terribly sensitive before the person arrives in the country, but an arbitrary public prosecutor unconstrained by independent courts might decide to turn that case into a show trial precisely because some foreign judge questioned his country about it. Or an issuing judge in a compromised judiciary may himself be operating directly under political pressure in a manner not consistent with the rule of law. EAWs require a high level of mutual trust,

and that trust has been underwritten by the guarantee that the rights of the individuals transferred will be respected because the whole process occurs under judicial supervision. If the judiciary in Poland is not independent because there are judiciary-wide pressures brought to bear on every individual judge, then how could any issuing court in Poland certify to any executing court anywhere in the EU that all Polish judges hearing the case would be independent? How does the issuing judge certify that *she herself* is independent?

As the American blues song lyrics go, "Ain't Nobody Here but Us Chickens." The song references an episode involving a chicken thief who was confronted by the farmer checking on his clucking birds in the night. When the farmer asked the chickens whether there was a thief among them, the thief – invisible in the darkness – answered "Ain't nobody here but us chickens!", demonstrating that you can't trust a chicken under stress to provide an accurate assessment of her situation. Worse yet, the very fact that a chicken speaks at all may be a sign of trouble. If judges in Poland are not independent, would you trust the judge issuing the EAW to say so? Ain't nobody here but us chickens, says the Polish judge.

What would it take for the EU to suspend Poland's ability to benefit from the automatic execution of European arrest warrants unless exceptions are made one by one? A case-by-case retail determination cannot guarantee that rights will be honored; the rule of law must be protected wholesale. And this is where the ECJ in *Celmer* failed spectacularly.

Rather than trust the sober and detailed assessment of the Commission, which found already last December that the judiciary in Poland had been impermissibly compromised, the ECJ in *Celmer* held that the test to determine whether a national judiciary had been compromised enough to suspend the general presumption that basic values are honored in all Member States was not a legal or factual test — but a political one. Citing Recital 10 of the EAW Framework decision, the Court found that the only way that a Member State could be found to violate basic values so that a *general* suspension of the EAW mechanism could be ordered would be through the unanimous agreement of the Member States:

70 It is apparent from recital 10 of [the European Arrest Warrant] Framework Decision 2002/584 that implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.

71 It thus follows from the very wording of that recital that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State.

72 Therefore, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically

to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

With those paragraphs, the ECJ announced that EU law will continue to operate *as if* all Member States are in adequate compliance with Article 2 TEU values until such time as the Masters of the Treaties – the Member States acting unanimously in the European Council (with the exception of the targeted state) under Article 7(2) – decide that a particular Member State does not meet the standards. And then under Article 7(3), the Council must specify each specific way in which the breach of these values affects the general application of EU law with regard to the offending Member State. No other procedure, according to *Celmer*, can result in a wholesale – and not just a case-by-case – suspension of the application of EU law to a Member State. The determination of whether a Member State has failed to honor the values of Article 2 TEU is not for the Commission to decide as a factual matter, as Justice Donnelly had inferred. It is also not for a "mere" four-fifths of the Council backed by a two-thirds vote of the European Parliament to decide, as is required under Article 7(1) TEU. No – the Masters of the Treaties must themselves speak in unison through Article 7(2) TEU and then issue concrete sanctions under Article 7(3) before a presumption can be replaced by reliable evidence to the contrary.

Article 7 (2) and (3) TEU are political mechanisms, not legal ones. Plus, they are political mechanisms that will never be successfully invoked. Hungary has said it will veto sanctions against Poland and vice versa, so virtually everyone working on the rule of law crisis in Europe now agrees that it is pointless to try to invoke Article 7(2). (I think there may be a way around this, as I outline here, but the ECJ would have to agree.) It is hard to imagine at this moment of normative breakdown in the EU that one could possibly find such a consensus. But it is precisely at this moment of normative breakdown when the enforcement of the basic values is most necessary.

The ECJ has now required a procedure that can never be used and that rests on political foundations to succeed before a *systemic* violation of basic values can be found. Never mind that real people are being hurt in the world by the presumption that Member States uphold the basic values of Article 2 TEU when they evidently don't. The ECJ tells us that a violation of basic values can now only be punished through the unanimous political will of its Member States at the wholesale level or on a case-by-case basis to do it in retail mode. Now that at least two of the EU Member States have already gone rogue, it means that the rule of law cannot be guaranteed in the EU as a structural matter.

The ECJ seems to have made an elementary mistake of history in reading the Framework decision's recitals. Recital 10 refers to what is now Article 7(2) and (3) TEU, but Article 7(1) did not exist at the time that the Council Framework Decision was enacted. Neither did the Rule of Law Framework under which the Commission issued its Reasoned Opinion to the Council. Surely the ECJ should, at a minimum, have considered whether the recitals at the time that the EAW Framework was written should be interpreted in light of the multiple mechanisms that had been developed since that time for spotting and calling out deviating Member States. Recital 10 invoked Article 7(2) and (3) because they were the only mechanisms available at the time, but now there are other ways to assess the situation in a Member State. The ECJ could also have avoided this terrain altogether by

indicating that the existence of the rule of law in a Member State is a *factual* question for the Commission, with its investigatory powers, to decide – rather than a *political* matter for the Member States acting in unison to determine. If the ECJ were determined to find that a systemic breach of the rule of law requires a *political* determination, at least it could have decided that a qualified majority – higher than for ordinary legislation but lower than unanimity – would have been sufficient so the serious *risk* of a breach under Article 7(1) could suspend the presumptions underlying the operation of mutual trust. But no – the ECJ announced in *Celmer* that only the Masters of the Treaties of the European Union, acting in concert, could determine whether any particular Member State has committed a wholesale violation of the rule of law.

Celmer tells us that when it comes to the structural enforcement of fundamental principles, the law disappears at the moment when it is most needed. At that moment, only politics remain. This is a particularly worrisome development in light of the fact that there are pending infringement procedures for attacks on the judiciary brought by the Commission against Poland. Could the ECJ be telling us that it does not have the power to decide whether there has been a wholesale violation of basic values? That this can be only a political judgment? That the Commission cannot take steps to require that Poland restore an independent judiciary because a fundamental breach of a Member State's obligation to honor European values isn't an assessment that the European Commission – or even the ECJ – can make? Let's hope that the ECJ does not believe that the rule of law runs out at its most crucial moment so that all we are left with is politics all the way down. That will spell the end of the EU as a normative community. The ECJ can still redeem itself with a robust finding in the pending infringement actions that the Poland must repair its damaged judiciary to come into compliance with Article 19(1), at least.

If the ECJ won't defend the basic values of the EU as a matter of law under the Treaties but instead reduces the *systemic* protection of these values to a naked political judgment of the Member States, however, then national judiciaries may find themselves in a *Solange*-like situation. In the original *Solange case*, the German Federal Constitutional Court announced that it would provide at national level protection of rights that were not guaranteed at EU level until such time as the EU could guarantee that rights were equivalently protected. If the ECJ insists that the process through which the EU ensures that basic values are systemically enforced is now a matter of naked political judgment rather than a matter of law, then the rule of law – and the rights that this value protects – cannot be reliably guaranteed. National judges should therefore engage in a *Solange*-like protest – that "so long as" the ECJ does not enforce the principle of the rule of law as a structural matter, the national judges will do it for them. Right now, under the *Aranyosi* standard, what can a national judge do when the Polish judge now says, "Ain't nobody here but us chickens!" – in a system that relies for the protection of rights on judicial assurances? National judges could enforce the principle of the rule of law by rejecting *all* EAWs from states that do not guarantee the independence of their own judiciaries. For that matter, national judges could also go further and refuse to honor *any* judgments from courts of these compromised states. Perhaps national judges will shoulder the burden of ensuring that that fundamental values – once common to the Member States but not any longer – are not just legal fictions.

SUGGESTED CITATION Scheppele, Kim Lane: *Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision, VerfBlog,* 2018/7/28, https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/.